No. 15-674

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

STATE OF TEXAS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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Pursuant to Rule 44 of this Court, the Acting Solicitor General, on behalf of the United States and the other petitioners, hereby respectfully petitions for rehearing of this case before a full nine-Member Court.

1. This case involves a challenge by the respondent States to a November 20, 2014 memorandum (Guidance) issued by the Secretary of Homeland Security. Among other things, the Secretary's Guidance directed his subordinates to establish a process for considering requests for deferred action from certain aliens. The respondent States challenged the Guidance on substantive grounds and on the basis that it was promulgated in violation of the notice-and-comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. 553. On February 16, 2015, the district court entered a preliminary injunction barring implementation of the Guidance nationwide. Pet. App. 407a-410a. After expediting the appeal, a divided panel of the

Fifth Circuit affirmed the preliminary injunction on November 9, 2015. *Id.* at 2a-3a; see *id.* at 1a-155a.

On January 19, 2016, this Court granted certiorari on four questions: (1) whether the respondent States have Article III standing and a justiciable cause of action under the APA; (2) whether the Guidance is arbitrary and capricious or otherwise not in accordance with law under the APA; (3) whether the Guidance was subject to the APA's notice-and-comment rulemaking procedures; and (4) whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3. See 136 S. Ct. at 906; Pet. i.

On June 23, 2016, after argument, this Court affirmed the judgment of the court of appeals by an equally divided Court, with eight Members participating in the decision.

2. Ordinarily, it is exceedingly rare for this Court to grant rehearing. But when this Court has conducted plenary review and then affirmed by vote of an equally divided court because of a vacancy rather than a disqualification, the Court has not infrequently granted rehearing before a full Bench. "[R]ehearing petitions have been granted in the past where the prior decision was by an equally divided Court and it appeared likely that upon reargument a majority one way or the other might be mustered." Stephen M. Shapiro et al., *Supreme Court Practice* § 15.6(a), at 838 (10th ed. 2013). "The small number of cases in which a full Bench can rehear a case decided by an equal division probably amounts to the largest class of cases in which a petition for rehearing after decision on the merits has any chance of success." *Id.* at 839.

For example, the government petitioned for rehearing in *United States* v. *One 1936 Model Ford V-8 De*

Luxe Coach, 305 U.S. 666 (1938), after this Court divided equally in a case when there was a vacancy due to Justice Cardozo's death, but before the vacancy was filled. This Court granted the petition, *ibid.*, then heard the case after Justice Frankfurter was confirmed. 307 U.S. 219 (1939). This Court similarly granted petitions for rehearing before a full Bench in a series of cases decided 4-4 after Justice McReynolds' retirement caused a vacancy in 1941;[1] after a leave of absence by Justice Jackson caused a temporary vacancy in 1945;[2] and after Justice Jackson's death caused a vacancy in 1954.[3] See also, *e.g.*, *Pollock* v. *Farmers' Loans & Trust Co.*, 158 U.S. 617 (1895) (similar for absence due to illness); *id.* at 601-606 (reproducing petition for rehearing discussing earlier cases); *id.* at 606-607 (granting rehearing).

In such situations, the Court has not infrequently held the case over the Court's summer recess, holding oral arguments months later. For example, in *Halliburton Oil Well Cementing Co.* v. *Walker*, 327 U.S. 812, the Court granted rehearing in February 1946, *ibid.*, and heard reargument 240 days later in October 1946, see 329 U.S. 1 (1946). See also, *e.g.*, *MacGregor* v. *Westinghouse Elec. & Mfg. Co.*, 329 U.S. 402 (1947) (reargument 248 days after rehearing granted); *Bal-*

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[1] *Baltimore & Ohio R.R.* v. *Kepner*, 313 U.S. 597 (1941); *Toucey* v. *New York Life Ins. Co.*, 313 U.S. 596 (1941); *New York, Chi. & St. Louis R.R.* v. *Frank*, 313 U.S. 596 (1941); *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 313 U.S. 596 (1941).

[2] See *MacGregor* v. *Westinghouse Elec. & Mfg. Co.*, 327 U.S. 812 (1946); *Bruce's Juices, Inc.* v. *American Can Co.*, 327 U.S. 812 (1946).

[3] *Indian Towing Co.* v. *United States*, 349 U.S. 926 (1955); *Ryan Stevedoring Co.* v. *Pan-Atl. Corp.*, 349 U.S. 926 (1955).

timore & Ohio R.R. v. *Kepner*, 314 U.S. 44 (1941) (175 days later). In a few earlier cases, several years elapsed between the grant of rehearing and reargument. See *Home Ins. Co.* v. *New York*, 122 U.S. 636 (1887) (granting rehearing February 7, 1887), and 134 U.S. 594 (1890) (reargument March 18-19, 1890); *Selma, Rome & Dalton R.R.* v. *United States*, 122 U.S. 636 (1887) (granting rehearing March 28, 1887), and 139 U.S. 560 (1891) (reargument March 25-26, 1891).

3. The need for rehearing is also more pressing here than in *Friedrichs* v. *California Teachers Ass'n*, 136 S. Ct. 1083, reh'g denied, No. 14-915, 2016 WL 3496857 (June 28, 2016), and in *Hawkins* v. *Community Bank of Raymore*, 136 S. Ct. 1072, reh'g denied, No. 14-520, 2016 WL 3461626 (June 27, 2016). In those cases, after lengthy consideration, this Court denied petitions for rehearing before a full Bench following 4-4 decisions from this Court. The issues that warranted certiorari in *Friedrichs* and *Hawkins* may freely recur in other cases, however, and thus there was no need for this Court's review in those particular vehicles. By contrast, the validity of the Guidance is unlikely to arise in any future case. The preliminary injunction here prohibits the government from implementing the Guidance anywhere nationwide; there is no reason to expect that the district court would issue a permanent injunction that is narrower; and no other pending case challenges the Guidance. See Pet. 35. Unless the Court resolves this case in a precedential manner, a matter of "great national importance" involving an "unprecedented and momentous" injunction barring implementation of the Guidance will have been effectively resolved for the country as a whole by a court of appeals that has divided twice, with two judges voting

for petitioners and two for respondent States. Pet. 11, 32. As this Court recognized in granting certiorari, this Court instead should be the final arbiter of these matters through a definitive ruling.

To be sure, because this case arises on appeal of a preliminary injunction, the same issues could arise again in this case following entry of a final judgment and a subsequent appeal. But as the Court determined in granting certiorari and scheduling argument for the October 2015 Term, there is a strong need for definitive resolution by this Court at this stage. See Pet. 33-34 (noting interests of the government and individuals in a prompt resolution). And the justification that might be advanced in other cases for awaiting an appeal from a final judgment down the road have little force here, because the court of appeals' legal rulings leave little or no room for a different outcome below: The court held that Texas's "standing is plain"; that Texas "satisfies the zone-of-interests test"; that the Guidance "is not an unreviewable agency action . . . committed to agency discretion by law"; that the respondent States are likely to establish that the Guidance must go through notice-and-comment; and that the Guidance is "manifestly contrary to the INA." Pet. App. 11a, 37a, 50a, 76a (citation and internal quotation marks omitted); see *id.* at 68a. This Court therefore should grant rehearing to provide for a decision by the Court when it has a full complement of Members, rather than allow a nonprecedential affirmance by an equally divided Court to leave in place a nationwide injunction of such significance.

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For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted.

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JULY 2016

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

IAN HEATH GERSHENGORN
Acting Solicitor General